(2)

No. 94-191

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IN THE

Supreme Court of the United States

October Term, 1994

LEE S. RUMSEY, DOUGLAS DiGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and PHILIP COOMBE, JR., as Acting Commissioner of the New York State Department of Correctional Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Question Presented

Whether a State employer's practice of rescheduling employees' days off to correspond with dates of those employees' military reserve training obligations, undertaken in response to documented abuse of military reservists' privileges by employees, violates the Veterans' Reemployment Rights Act (38 USC §§ 4301, *et seq.*).

Parties

The parties to the proceeding below were:

1. Lee S. Rumsey, Plaintiff;

2. Douglas DiGerlando, Plaintiff;

3. Michael Rhodes, Plaintiff;

4. Thomas Graves, Plaintiff;

5. New York State Department of Correctional Services, Defendant;

6. Thomas Coughlin, III, as Commissioner of the New York State Department of Correctional Services, Defendant.

Plaintiffs Rumsey, DiGerlando, Rhodes, and Graves brought suit individually and as representatives of a class of persons similarly situated.

Commissioner Coughlin retired from his position as Commissioner of the New York State Department of Correctional Services effective August 11, 1994. Philip Coombe, Jr., who is currently Acting Commissioner of Correctional Services, has been substituted as a respondent in this matter pursuant to Supreme Court Rule 35.3.

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No. 94-191

IN THE

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OCTOBER TERM, 1994.

LEE S. RUMSEY, DOUGLAS DIGERLANDO, MICHAEL RHODES and THOMAS GRAVES, individually and as representatives of a class of persons similarly situated,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES and PHILIP COOMBE, JR., as Acting Commissioner of the New York State Department of Correctional Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

Petitioners in this matter are employees of respondent Department of Correctional Services (Department) and are also members of the New York State National Guard or

other reserve units of the United States Armed Forces. In their capacity as military reservists, petitioners are obliged to fulfill various annual training requirements, generally consisting of weekend drills and an annual two-week summer training session. Prior to March 1982, on occasions when their military obligations arose on scheduled work days, Department employees who were military reservists or National Guard members were permitted to fulfill those obligations upon notice to their supervisors. Under New York State Military Law § 242(5), these employees received payment for scheduled work days on which they were obliged to perform military service, up to a maximum of thirty days each year. On occasions when an employee's military obligation arose on a pass day (day off), the employee served the obligation without payment.

In March 1981, upon the receipt of several complaints from correctional facility administrators concerning abuses in the system of paid military leave, the Department conducted a statewide internal investigation of the leave issue. Problems examined during the course of the investigation included staff shortages at facilities, pressures on staff caused by excessive mandatory overtime, and excessive overtime costs to the Department. An audit conducted during the course of the investigation revealed problems including: failure of employees to report to ordered military drills after being granted leave by the Department; employees calling in sick to military drills and failing to notify the Department; employees departing early from military drills without notifying the Department; and employees no longer in the military submitting false orders authorizing

military leave (JA44).[1] In the course of the audit, approximately 47% of 245 examined leave cases were found to be undocumented (JA44).

In consequence of these problems with military leave practices, the Department issued Directive 2212 on March 30, 1982, setting forth a variety of procedures for requesting, approving and verifying the use of paid military leave by Department employees. The Directive provided, *inter alia*, that the Department (JA735):

> will review the quarterly training [military] schedules and extra ordered military duty so that, when practicable and consistent with the Department's personnel requirements, regular days off and shift assignments may be revised to avoid military drills during scheduled working hours.

The goals of Directive 2212 were mitigation of abuse of paid military leave, reduction of global overtime and other costs caused by absenteeism through such abuse, minimization of recourse to use of vacation and personal leave for military duties, and maintenance of the fullest possible complement of Department employees at facilities throughout the State.

In September 1982, petitioners commenced an action against respondents alleging that the rescheduling practice pursuant to Directive 2212; (1) violated their collective bargaining agreement solely because of their status as reservists and therefore violated the Veterans' Reemployment

[1]References to "JA" are to pages in the Joint Appendix to the Second Circuit.

Rights Act of 1974, 38 USC §§ 2021 *et seq.* [renumbered §§ 4301 *et seq.]* (Veterans' Act); (2) violated a provision of New York State's Military Law; and (3) violated the Equal Protection Clause. Petitioners sought injunctive relief, compensation for past rescheduled pass days, and attorneys' fees.

Following trial, the district court (Cholakis, J.) issued a Memorandum Decision and Order on February 19, 1987, holding that the rescheduling policy violated a provision of petitioners' collective bargaining agreement and consequently violated 38 USC § 2021[4301](b)(3) (Petition, p 51a). The district court did not rule on petitioners' pendent Military Law claim. In a subsequent Memorandum Decision and Order dated December 31, 1991, the court awarded damages against respondents at overtime rates for each pass day rescheduled, and also awarded attorneys' fees against respondents pursuant to 42 USC § 1988 (Petition, p 26a). Finally, in a Memorandum Decision and Judgment dated March 2, 1993, the district court approved a schedule of awards to class members and retained jurisdiction for the award of attorneys' fees.

On appeal, the Court of Appeals for the Second Circuit in March 1994 affirmed in part and reversed in part the district court's order and remanded the matter to the district court for recalculation of damages (Petition, p 1a). The court concluded, *inter alia*, that: (1) the district court's holding that the rescheduling policy violated petitioners' collective bargaining agreement with the State of New York was not clearly erroneous (Petition, p 12a); but (2) the rescheduling policy did not constitute a violation of the Veterans' Act (Petition, p 16a); and (3) petitioners were not entitled to attorneys' fees under 42 USC § 1988 (Petition, pp 19a-20a).

The court also ruled, however, that the district court's award of damages was proper to the extent that such damages cured the breach of the collective bargaining agreement (Petition, p 17a).[2]

Summary of Argument

The Second Circuit rightly held that the Department's Directive, issued to curb abuses of paid military leave under State law by its employees, did not infringe upon a substantial incident or benefit of employment protected by the Veterans' Act. That holding is in full accord with this Court's precedent and the legislative purpose of the Veterans' Act, poses no conflict with decisions in other jurisdictions, and is eminently rational. Therefore, this Court's review of the matter is unnecessary and the petition for a writ of certiorari should be denied.

Argument

In *Monroe v Standard Oil Co.*, 452 US 549, 559 (1981) (employer's failure to arrange substitute work hours for reservist employee did not violate the Veterans' Act), this Court found that section 4301(b)(3) was

> enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion motivated solely by reserve status.

[2]Believing that this finding violates the Eleventh Amendment and this Court's holdings in *Pennhurst State School & Hospital v Halderman*, 465 US 89 (1984), and *Edelman v Jordan*, 415 US 651 (1974), respondents recently filed a petition for a writ of certiorari (No. 94-232) for review of this discrete issue.

The Court noted that testimony before Senate and House Committees recorded in the legislative history of the Act (452 US at 562, emphasis in original)

> made it abundantly clear that the purpose of the legislation was to protect employee reservists from discharge, denial of promotional opportunities, or other comparable *adverse* treatment solely by reason of their military obligations; there was never any suggestion of employer responsibility to provide preferential treatment.

The Court further noted (452 US at 563 [footnotes omitted]):

> And certainly there is nothing in the legislative history that would indicate Congress intended that reservists were to be entitled to all "incidents and advantages of employment" accorded during their absence to working employees, including regular time and overtime pay.

Monroe makes clear that the protections afforded by 38 USC §§ 4301-4307 do not grant servicemen new rights or powers in relation to their work peers, or protect them from the administrative amendment of special rights granted to servicemen under State law, but merely protect them from discharge, denial of promotional opportunities, or other *comparable* adverse treatment motivated solely by reserve status, or "solely by reason of their military obligations". 452 US at 562. Applied to the case at bar, where no adverse treatment comparable to discharge or denial of promotional opportunities is at issue, *Monroe*

conclusively establishes the correctness of the Second Circuit's conclusion that the Directive did not violate the Act.[3] Indeed, the United States Department of Labor, charged with the enforcement of the Veterans' Act (38 USC § 4305), concluded in an advisory opinion that the rescheduling of pass days to coincide with military obligation in order to minimize payment of military leave did not violate the Act. *See, Gilman v Iowa State Penitentiary*, Case No. 62-7019 (1981).[4]

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[3]The fact that reservists may receive paid leave under New York Military Law § 242 does not alter this conclusion. Inasmuch as 38 USC § 4301 addresses only rights afforded to *all* employees, it neither addresses nor protects any special benefits made available to reservists and Guardsmen under state law. While Directive 2212 may in some cases limit the opportunity of a reservist or guardsman's ability to collect paid military leave under section 242, that limitation simply does not pertain to section 4301.

[4]This opinion instructively measures the competing interests of the parties in the matter at bar (emphasis added):

> Scheduling has always been a management prerogative, and it is assumed that scheduling is an essential element in operating efficiency. The allocation of resources in any endeavor must be efficient if success is to be realized. *A reservist is in no way penalized by being scheduled to be off on those days coincidental with his military duty.*
>
> * * *
>
> In the present case the issue is simply scheduling off days. Except in those instances where the scheduling is done exclusively by seniority, it should not be construed as an incident of employment, but rather a management prerogative. This even becomes more valid when juxtaposed against the veteran's real gripe that he needs the rest afforded by off days. It takes little imagination to compare the veteran here with those individuals who work a normal work week and still have the same military obligation to fulfill on weekends. Consequently, to construe the Act to permit individuals to get extra days off for rest in weeks they have reserve duty would be an absurd result.

We note further that the Directive imposed merely a temporary alteration of a small part of employees' pass day schedules. Significantly, employees bid on these schedules, according to seniority, in a single package which included a host of characteristics—location of post, nature of work, timing of shifts, and pass day schedule. The bulk of these characteristics were unaffected by the Directive. The Directive did not change the nature or location of the employees' work. Nor did it reduce their compensation received for that work; employees continued to earn forty hours pay for forty hours work. It did not limit seniority or pension rights; under the Directive, all Department employees, including military reservists and Guardsmen, continued to be able to bid on job packages in accordance with seniority. It did not reduce the opportunity to earn overtime. The single change required by the Directive was a shift in pass days on those few occasions during each year when Department employees had military training on weekends when they were scheduled to work. On those occasions, and on those occasions only, their pass days were rescheduled to coincide with military duty, in order to avoid abuse and to permit employees to perform military duty without altering their employment obligations vis-a-vis other, non-reservist employees. In this, the Directive merely treated all employees as if they were obligated to work forty hours each week for forty hours pay. Likewise, it treated all employees pursuing military training as if they had Saturdays and Sundays off.

No court has held that the Veterans' Act bars so minor a change as that imposed under the Directive—especially when it has been undertaken to reduce documented abuse of the military training system and places reservists at parity

with, rather than behind, non-reservist employees.[5] In each case where an employer's practice has been found to violate the Act, the incident or advantage of employment at issue was substantially more significant than that addressed here. Loss of employment is a clear example of such an advantage. *Peel v Florida Department of Transportation*, 600 F2d 1070 (5th Cir 1979). So too are workplace assignment and duties assigned. *Carlson v New Hampshire Department of Safety*, 609 F2d 1024 (1st Cir 1979), *cert denied*, 446 US 913 (1980) (employer may not permanently reassign an employee to a new post with different duties and work schedule on account of employee's reserve obligation). Another such incident is the salary assured by a forty-hour workweek guaranteed under a collective bargaining agreement. *West v Safeway Stores, Inc.*, 609 F2d 147 (5th Cir 1980) (employer required to schedule employee to work hours around the employee's military training obligation). But nowhere among these cases, or among any of the many cases cited by petitioners in their petition, is there a suggestion that a rescheduling of days off when necessary to permit employees to perform military service without interfering with their normal job duties constitutes improper action under section 4301(b)(3).

In light of the foregoing, petitioners' arguments supporting their petition are meritless. Contrary to their suggestion (Petition, pp 9-10, 15-16), the court below did not misconceive this Court's holdings in *Monroe* and *Accardi v Penn-*

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[5]We note that the reduction of fraud under the Directive yields clear benefit to the military institutions served by Department employees.

sylvania Railroad Co., 383 US 225 (1966). Nor did the court's holding "add[] a substantiality test" (Petition, p 10); instead, it merely affirms this Court's holding in *Monroe* that not every asserted "benefit" of employment is entitled to protection under the Act. Petitioners' claim that there is current theoretical confusion over what constitutes an incident or advantage of employment under the Act (Petition, p 12) is not relevant to the instant matter, where petitioners have failed to proffer any legal authority recognizing a claim under the Act comparable to the claim asserted here.

Nor are petitioners correct in their claim (Petition, pp 13-14) that the case conflicts with the Third Circuit's holding in *Waltermyer v Aluminum Company of America*, 804 F2d 821 (3d Cir 1986). In *Waltermyer*, the court held that an employee could not be penalized vacation pay received by other employees merely because he was absent from work during the holiday period due to military reservist commitments. 804 F2d at 825. In the instant matter, the Directive denied reservists neither salary, monetary benefits, pension rights, nor other rights or benefits available to a non-reservist.

Finally, petitioners simply have no foundation for their claim that this decision may have "an important and deleterious effect on the functioning of the Reserve and National Guard service" (Petition, p 18). Contrary to petitioners' suggestion (Petition, p 18), the Veterans' Act was not designed to protect reservists from the use of days off for

military training purposes.[6] Indeed, the majority of reservists who work on weekdays routinely spend days off at military training as part of their Reserve commitment—for which they are compensated and for which they receive the appreciation of a grateful nation. The Department's implementation of the Directive was not designed to treat reservists differently from other, non-reservist employees, but rather to adjust their employment obligations to correspond to those of their reservist peers who have weekends off, as well as those of non-reservist employees. The court below rightly found that this practice is unassailable under the Veterans' Act.

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[6]As the court correctly noted in *Pignato v American Trans Air, Inc.*, 14 F3d 342, 350 (7th Cir), *cert denied*, ____ US ____, 114 S Ct 2675, 129 L Ed 2d 810 (1994) (Guard member not entitled to special work scheduling preference to assure that military duty is performed during working hours, rather than during employee's personal time):

> At bottom, what [the employee] wanted was for any and all inconveniences of his Guard service to fall on [the employer], and none on himself. But this is not what the law, as set forth in *Monroe*, requires. [The employee] has no right to any such special treatment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
August 26, 1994

Respectfully submitted,

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